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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 596

HARRY R. ILLMAN

Petitioner

v.

THE TOLEDO BAR ASSOCIATION

Respondent

REPLY BRIEF ON BEHALF OF PETITIONER

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This brief is submitted on behalf of the petitioner in reply to the brief of respondent. Under "Statement Of The Case," respondent tends to confuse its conclusions derived from the facts as adduced and the facts themselves. For instance, the respondent recites that "commingling" was established as a "fact" because the petitioner "admitted" that he signed the draft in question, that he deposited it in his bank account and that thereafter the bank account reflected balances lower than the amount of the draft.

The glaring omission from the "facts," of course, is petitioner's testimony—supported in critical part by his secretary and by his office associate—that he had in fact cashed the draft from funds available in his office and had segregated in cash in a separate properly identified envelope kept in his office desk more than enough to cover any claim which the complainant might have against the proceeds of the draft. So, that when he deposited the draft in his account he was in fact depositing his own funds, and therefore the status of his bank account thereafter was completely irrelevant.

Respondent persists in refusing to acknowledge or to admit that the essence of the case against the petitioner is the refusal of the hearing panel, or the Board of Commissioners

on Grievances and Discipline or the Ohio Supreme Court to believe petitioner's testimony under oath as to the cashing of the draft, even though his testimony is supported by credible evidence in the Record and there is no evidence to the contrary—only doubt.

Respondent is correct in stating that it was petitioner's objection which resulted in the hearing panel rejecting evidence of petitioner's misconduct which had been offered by respondent, and that it was because of this ruling that the petitioner made no offer or tender to the hearing panel of evidence concerning his reputation and conduct at the bar. Nowhere in petitioner's opening brief is there a statement made to the contrary. Petitioner's objection which was sustained by the hearing panel was based upon the fact that the respondent was offering the record of prior charges against petitioner as part of its evidence in chief against him in the instant proceeding, which was completely unrelated to the earlier record.

The hearing panel properly sustained the petitioner's objection to the introduction of such evidence at that particular time. Petitioner then anticipated that such evidence and other evidence reflecting upon petitioner's conduct and character would be considered not in determining the petitioner's guilt or innocence but solely in the event that guilt was established for the purpose of weighing the penalty that should be recommended or administered. The question which the Record presents on this point is, do the due process requirements of the law assure to the accused an opportunity to be heard in mitigation of penalty so that he may offer evidence as to his prior good conduct and character?

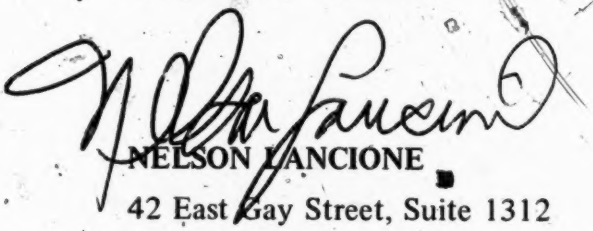
It is no answer to this question to refer, as respondent has, to the comment of the Ohio Supreme Court made at the conclusion of its opinion that it considered petitioner's "professional record" in accepting the Board's recommendation on the penalty. Obviously, the Ohio court was referring to the disciplinary action in which petitioner had been involved years previously (and the evidence concerning which had been rejected by the hearing panel), and not to the affidavits and statements submitted by the petitioner evidencing his subsequent good conduct and professional standing. The lower

court's comment in this regard would appear to strengthen petitioner's contention that he was deprived of a fair and equal opportunity to be heard, since consideration was given only to the "bad" and not to the "good."

In challenging petitioner's charge that he has been denied due process of law, and in supporting its contention that the petition for writ of certiorari should not be allowed, respondent relies heavily on the case of *Selling* v. *Radford,* 243 U.S. 46 (1917). Petitioner accepts that challenge. Every test suggested in the course of the *Selling* opinion is met here.

(1) The state procedure, not as enunciated in the rules but as applied to the petitioner, denied to petitioner an opportunity to be heard;
(2) the record is devoid of "proof of facts," that would give rise to a clear conviction that petitioner was guilty of professional misconduct as charged; and
(3) to permit petitioner to stand indefinitely suspended from the practice of law "would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principals of right and justice, we were constrained so to do."

Respectfully submitted,



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END